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Supreme Court of the United States

OCTOBER TERM, 1947

F. J. ENGLERT,

Petitioner,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSON CO., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

OSCAR A. ZABEL,
FREDERICK PAUL,
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818 Fourth & Pike Building, Seattle, Washington.

Sherman Printing & Binding Company, Seattle

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Respondents.

To: The Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

F J. ENGLERT respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals (Judges Garrecht, Matthews and Healy) rendered its judgment June 27, 1947 (R. 127). The decision, reported at .... F. (2d) ....., affirmed a final judgment of the District Court of the Western District of Washington, Northern Division, in favor of respondents as to the period of employment of the claimant here involved, denying DONALD C. STUART any recovery for overtime wages alleged to be due under the Fair Labor Standards Act of 1938, 29 U.S.C. 207(a) and 216(b). The District Court's opinion is not reported but appears at R.

108-111. The opinion by the Circuit Court of Appeals appears at R. 119-127.

SUMMARY STATEMENT OF MATTER INVOLVED

This is an action for overtime compensation under the Fair Labor Standards Act of 1938. This petition is sought on behalf of petitioner for Cause of Action No. 2, Claimant DONALD D. STUART, a former employee of respondents.

The regular rate of pay, the number of overtime hours and the amount due petitioner as assignee of the employee is admitted and is noted in the margin.[1]

The issue is whether the duties of the claimant is an activity in "commerce," which in turn, is dependent upon whether the goods upon which he worked is in "commerce."

This is a companion case to *Soderberg, et al., v. these respondents*, now pending on petition for certiorari, and is being prosecuted for the petitioner as assignee of Donald D. Stuart, cause of action No. 2.

It was stipulated between the parties (R. 17)

[1]The employee worked for a stipulated salary per 48-hour week. The regular rate of pay was 1/48 of the stipulated salary. He had a uniform work week of 70 hours per week at the rate of 10 hours per day for which he was paid his stipulated salary for 48 hours and two times his regular rate for the 10 hours occurring on the seventh day of the week. He has thus due him one-half his regular rate for the hours between 40 and 48 each week; 1½ times his regular rate for the hours each week between 48 and 60. The overtime compensation due under the Act, and an equal amount as liquidated damages for the claimant is, $2457.62, being the total due.

that it was deemed essential by the Government of the United States that certain Islands of the Aleutian group in Alaska be fortified and improved, and structures erected so that the said Island could be utilized for the purpose of national defense. Among the various projects were the ones at which this claimant worked, as an employee of the respondents, who were the contractors for the building of the improvements and structures.

The respondents' contract, among other things, provided that the petitioner was to procure supplies for use in building the improvements and for the operation of a resale commissary, to furnish labor from Continental United States, and to operate mess halls and quarters.

The journey of the goods was from Continental United States to a dock in the Aleutian Islands, to a sorting or classification yard two miles away from the dock, to a material and supplies warehouse, from there to the fort or the commissary depending upon the type of goods. Claimant STUART, Cause No. II, worked in the company warehouses (R. 43), where he would check the purchase orders (by which the respondents purchased the goods for the Government in Continental United States) against the ships' manifests and make up a list of the goods received as compared with the goods ordered by the purchase orders (R. 87). He would also prepare the papers for the checkers who would check the merchandise at the sorting yard (R. 92, 102).

The District Court, in its oral decision, concluded

that the duties of claimant STUART were not within the coverage of the Act, because his duties were connected with materials after they got to the Island rather than before they got there (R. 109). The Circuit Court of Appeals held, there is no substantial evidence that claimant STUART was engaged in commerce, and that the burden rested on him to prove it (R. 126).

REASONS RELIED ON FOR ISSUANCE OF WRIT

The only evidence in this case, is that claimant STUART was employed by the consignee of goods transported from the Continental United States, to assist in the process of receiving such goods by such consignee, the respondents herein. This Court should exercise its supervisory authority, because the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, and other applicable decisions of this Court.

PRAYER

WHEREFORE, Your petitioner prays that this Honorable Court issue its writ of certiorari, to the Circuit Court of Appeals for the Ninth Circuit, said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and proceedings in the instant case, to the end that said case may be reviewed and determined by this Court, as provided by law, and that said judgment of the said Circuit

Court of Appeals may be reversed by this Honorable Court.

Dated at Seattle, Washington, this 19 day of Sept., 1947.

OSCAR A. ZABEL,
FREDERICK PAUL,
Counsel for Petitioners.

ZABEL, POTH & PAUL,
Of Counsel.

BRIEF

OFFICIAL REPORTS

The opinion of neither the District Court nor the Circuit Court of Appeals has been officially reported. The opinion of the District Court appears at R. 108-111, and of the Circuit Court of Appeals at R. 119-127, and 13 C.C.H. Labor Cases, Par. 63, 892.

JURISDICTION

This is an action for overtime compensation brought under the Fair Labor Standards Act of 1938, 52 Stat. 1063, 29 U.S.C., Sections 201-219. Under Section 7(a), the employer is required to pay for excess hours of work not less than one and one-half times the regular rate.[1]

An employer who violates this sub-section is liable to his injured employee in the amount due and unpaid and an additional equal amount as liquidated damages.[2]

The jurisdiction of this Court is authorized by 28 U.S.C., Section 347(a), (Judicial Code, Section 240, as amended).

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[1]Sec. 7. (a) No employer shall, except as otherwise provided in this Section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * for a work week longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. * * *

[2]Sec. 16. (b) Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the

DATES OF JUDGMENT BELOW

The District Court entered its judgment November 9, 1945 (R. 29). The Circuit Court of Appeals entered its judgment June 27, 1947 (R. 127-128). This petition is served and filed within three months from June 27, 1947, 28 U.S.C., Section 350.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred as follows:

1. In relying upon a Conclusion of Law that the claimant's duties "were not in commerce, or in the production of goods for commerce," found in the Findings of Fact *as a Finding of Fact.*

2. In holding that the claimant has not sustained his burden of proof of establishing his duties as being in commerce.

3. In holding that the receipt by the consignee of goods transported interstate is not an activity in interstate commerce.

---

amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves or any other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action.

ARGUMENT

There is no Finding of Fact as to the duties of the claimant, except the ultimate fact that he was not engaged in commerce (R. 24), for which this Court may substitute its judgment for that of the trial court. *Bogardus v. Commissioner*, 302 U.S. 35, 39.

There is no Finding of Fact that the final destination of the goods was any particular place, so petitioner has no presumption to overcome and this Court may draw the appropriate inference of where the final destination was.

This case clearly falls within the rule of *Walling v. Jacksonville Paper Co.*, 317 U.S. 564. The claimant was intimately connected with the receipt of the goods from Continental United States. *Higgins v. Carr Bros. Co.*, 317 U.S. 572, is inapplicable because there the employee worked on the goods after arrival at the warehouse; and, the warehouse was considered its final destination, because no one knew where the goods were thereafter going. Our claimant's duties were part of the *receiving* process in the sorting yard and warehouses, that is to say, receiving of the goods by the consignee from Continental United States.

We believe it so incredulous to argue that he failed to sustain his burden of proof, as alleged by the Circuit Court of Appeals, that no claimant ever could prove his case if the manifest error by the Circuit Court of Appeals be allowed to stand. It is a case, therefore, which calls for the supervisory authority of this Court to correct.

For the Court's convenience, we have printed portions of the record in the appendix.

On the issue of Government transportation as being merely an administrative act of the Government and not commerce, reference is made to our brief in the companion case, *Soderberg, et al., v. these defendants*, pending here on Petition for writ of certiorari.

Respectfully,

OSCAR A. ZABEL,
FREDERICK PAUL,
Counsel for Petitioners.

ZABEL, POTH & PAUL,
Of Counsel.

APPENDIX

R. 87-90

Testimony of Donald D. Stuart
on Direct Examination

"Q. Will you state your duties as storekeeper while in Alaska?

A. Just how shall I answer that question—start with what I did from the start, do you mean?

Q. Yes. Give us an outline of your duties.

The Court: In Alaska.

Mr. Zabel: In Alaska.

The Court:In respect to which you are making this claim in this lawsuit?

Mr. Zabel: That is correct, Your Honor.

A. Well, I had charge of all of the records of merchandise and equipment received at this job site; the checking of the P. O.'s.

Q. Just tell the Court what a P. O. is.

A. A P. O. is a purchase order; the checking of all purchase orders; the checking of the ship's manifests; the goods when they arrive, and checking back the receipts of those against the purchase orders. It was also my duty to lay out for the actual checkers at the unloading platform the various merchandise and (70) goods that were received on the Island.

Q. Were you employed in this capacity during your full period of employment in Alaska?

A. Yes, sir.

Q. What type of goods were received?

A. All types of equipment and clothing and commissary items, in the nature of tobacco, cigarettes, shoes and also equipment and materials for the kitchens, the mess halls.

Q. Were there any materials in connection with construction of anything at the job site?

A. Our office was responsible for the checking of all materials that we were responsible for; that included black-top as well as machinery. It included fuel oil. It included all merchandise and all equipment of every nature. In fact, our office had the complete list of all of the purchase orders for everything that was purchased by the company for its use on that island.

Q. Where did these materials come from?

A. Oh, every place—all over the United States.

Q. Did you have anything to do with the actual construction of facilities and of the base itself?

A. Do you mean construction work, engineering work?

Q. Yes?

A. No, sir, not at all. (71).

Q. Can you state just how the materials were received on the island?

A. They came in by boat and after the boat was docked they were unloaded into Army trucks and brought up to a yard that had what is known as an unloading platform. All of our supplies as well as other contractors' supplies were all loaded onto this unloading platform. When they were unloaded on there, our storekeeper clerks, and the checkers checked over the various quantities which were there and took out and into our own trucks the merchandise that belonged to us; and the other companies took into their truck the merchandise that belonged to them.

These boxes, or cases,—whatever it might be—were all lettered with "B.M.K." or some character of that nature that designated who it was for and either the P.O's—purchase orders, pardon me—or the requisition number printed on it which gave our checkers the opportunity of picking out the various

things that belonged to us as against the things that belonged to other contractors.

Then they were loaded into our trucks and delivered from this unloading platform to our own warehouses.

Q. At the warehouses, what was done with reference to these (73) materials?

A. When the items were received at the various warehouses, dependent upon what it might be, the cases were opened and the merchandise checked against the purchase order for quantity.

If that particular case of items was necessary for a particular work or for the mess hall or whereever it might be, it was then routed to that particular destination.

Q. At the time of the checking against the purchase orders, was there any document involved in that proceeding?

A. Say that again, Mr. Zabel?

MR. ZABEL: I will withdraw that question.

Q. (By Mr. Zabel, continuing) At the time of the process of checking against the purchase order, were there any other papers besides the purchase order involved?

A. Well, there was the original list that I made out for my checkers to use on the unloading platform. Then the man in charge of the warehouse where these goods were checked was given four copies of what we call the engineers' receipts. He checked against that—wrote on that the purchase order number and the vendor's name, and any other pertinent history, and the quantities that were checked, and signed those four receipts, and (73) they were turned over to me. Two of those receipts I then routed to the United States Engineers' office, and one copy was put in our numerical file and

the fourth copy was put in our alphabetical file and kept and retained in the office where I was.

Q. You mentioned something about manifests. Will you describe what that is?

A. After the ship arrived at the base, there were several copies of what was known as the ship's manifests that was gotten out by the engineers for various of their departments. We were always given one copy that contained the listing of the exact amount of merchandise that had arrived on that boat.

We used that as a basis of a secondary check in finding the articles on the receiving dock.
(Record 95-96, testimony of Donald D. Stuart on cross-examination.)

Q. You say there were expediters. You weren't an expediter, were you?

A. Not on the island, sir, but in the office here in Seattle.

Q. There were certain clerks that were down there at the platform to do the checking, weren't there?

A. With the same classification that I had.

Q. I say; there were certain clerks?

A. That is correct.

Q. There were certain clerks who had been assigned to that particular duty, were there not?

A. Yes, sir.

Q. You were not assigned to that duty of checking those goods at the unloading platform, were you?

A. No, sir, except that I was responsible after the checking was done.

Q. After these men had done the checking, then they turned in their record to you, that is correct, isn't it?

A. That is correct, yes, sir.

Q. As a matter of fact, your duties were to look at the lists after they had been checked by the checkers that were down there at the dock, that is correct, isn't it?

A. I wouldn't say that, no sir; because the papers that they checked from were all prepared by me before they ever did any checking.

Q. I see. You prepared the papers?

A. Yes, sir.

Q. And gave them to them? A. Yes, sir.

Q. You weren't responsible for their work in any way, were you?

A. Not theoretically, no.

Q. Then, after they had checked and these goods had arrived in the camp, they were put in the warehouse—your warehouse at the camp, weren't they? (80).

A. Yes, sir.

Q. And from then on, you had something to do with them; that is correct, isn't it?

A. Yes, sir.

Record (102-103) Testimony of Office Manager Finn on redirect examination.

Q. As to Mr. Stewart, he mentioned preparing some lists of (88) materials that were received?

A. Yes.

Q. Those lists were prepared, were they, before the materials arrived?

A. They were. They were taken off from the manifests as furnished by the Army Engineers. He, in turn, drew off these lists so that he could hand them over to the expediters, because we were required to return those manifests as shortly as possible to them."

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CITATIONS

Cases:

Soderberg et al, v. *S. Birch & Sons Construction Co.*, No. 359, this Term 2, 4, 5, 8

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 *et seq.*, 29 U. S. C. 201 *et seq.*, Sec. 7 2

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 358

F. J. ENGLERT, PETITIONER

v.

S. BIRCH & SONS CONSTRUCTION CO. AND MORRISON-KNUDSEN CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Washington, Northern Division (R. 108–111) is not officially reported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 119–127) is reported at 163 F. 2d 34.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on June 27, 1947 (R. 127–128). The petition for certiorari was filed on September 22, 1947. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a warehouse clerk, who was employed by a Government contractor engaged in the construction of fortifications on an Aleutian island base, and whose duties consisted of checking the receipt of goods consigned to the contractor at their final destination and after the termination of their continuity of movement, is "engaged in commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent part of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. 201, *et seq.*) provides as follows:

> SEC. 7 (a). No employer shall, * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

The instant action, a companion case to *Soderberg, et al.* v. *S. Birch & Sons Construction Co.*

et al., No. 359, this Term, was originally brought by petitioner on his own behalf and, as assignee of their causes of action, on behalf of three former fellow employees of respondents, for the recovery of overtime compensation, liquidated damages, and counsel fees under the provisions of the Fair Labor Standards Act, *supra* (R. 2–13). The complaint was in four counts (R. 2–13). It alleged that respondents[1] were engaged in the purchasing and using, selling and furnishing of materials, equipment and supplies in interstate commerce; that the duties of petitioner and his assignors constituted an essential part of the handling and the buying, selling and transporting of respondents' goods in interstate commerce; that the performance of such duties constituted "engaging in commerce" within the meaning of the Fair Labor Standards Act; and that respondents had failed to compensate them for hours worked in excess of 40 hours per week as provided for in the Act (R. 3–6). The trial court found that only one of the claimants had been "engaged in commerce" within the meaning of the Act (R. 23–25) and dismissed counts 1, 2 and 3 (R. 26–28).[2] On appeal, the court below af-

[1] Respondents were joint venturers (R. 104). S. Birch & Sons Construction Co. is a Montana corporation and Morrison-Knudsen Co. is a Delaware corporation; both corporations are qualified to do business in, and maintain an office in, the State of Washington (R. 23–24).

[2] The trial court found that claimant Bjorgum in count 4, shown to be respondents' Assistant Personnel Manager, had

firmed (R. 127–128). The petition herein was filed by petitioner on behalf of claimant Stuart in count two (Pet. 2; R. 7–9).

The facts are briefly summarized as follows:

As we have indicated in the *Soderberg* case, *supra,* (Br. in Op., pp. 4–9) the United States, as a defense measure, undertook to fortify certain of the Aleutian islands [3] and to improve existing

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been engaged in interstate commerce, since he was regularly and substantially working in the movement of employees in interstate commerce (R. 110). Accordingly, it held him entitled to overtime compensation together with an additional equal amount as liquidated damages plus counsel fees (R. 24–25). On appeal, the Government did not contest the correctness of this ruling. The claims of petitioner, who was shown to be the manager of the company store (R. 108), and of Rude, manager of the lodging and feeding service furnished respondents' employees (R. 109), are not involved in this petition. The claim of Stuart, which is the only claim involved in the instant petition, was dismissed on the ground that respondents' activity was not connected with getting material to the job site, nor was Stuart so concerned. Rather, the latter was dealing with materials which were moved from the storage place on the island to the particular site where the structure was being built on the same island (R. 109). Thus the court concluded, "it seems clear * * * that as to Mr. Stewart [sic] no claim has been established that his services were connected with or in any substantial way advanced the movement of materials in interstate commerce" (R. 109).

[3] The name of the island involved in the instant action has been withheld at the request of the Army (R. 40). Respondents were engaged in construction work at the base under contract with the United States (R. 23). Because the United States is or may become liable under the terms of the contract, defense of this action was undertaken by the Department of Justice at the request of the War Department.

structures located thereon (R. 17, 23, 122). Pursuant to this program, the Government entered into a contract with respondents whereby the latter agreed to do asphaltic concrete and asphaltic seal coat work on one of those islands (R. 17, 23, 122).[4] The claimant involved in the instant action was employed by respondents in the capacity of clerk in the company warehouse (R. 43, 87, see n. 2, *supra,* pp. 3–4), located at the job site from June 23, 1944, to February 17, 1945 (R. 21).

It was stipulated by the parties that the procurement of approximately 90% of the materials, equipment and supplies used in the overall construction of the project, was effected directly by the Government from various manufacturers, shipped to the project by Government-furnished transportation, unloaded from the vessels by military personnel, and delivered to the warehouses, asphalt plants or shops of the various contractors by Government-owned trucks operated by military personnel (R. 18, 123). The supplies procured by respondents herein[5] were procured by

[4] The contract specified that respondents' work was to be performed under the direction of the Army Engineers; that respondents furnish the necessary labor, and perform engineering, laboratory and inspection work; and that respondents furnish crews to operate mess halls and quarters (R. 18, 122–123). The building equipment and rations were furnished by the Government (R. 18, 123).

[5] Of the total tonnage of approximately 270,000,000 pounds, approximately 6 per cent was procured by respondents (R. 18, 123). See *Soderberg et al.* v. *S. Birch & Sons*

their Seattle, Washington office from various vendors throughout the United States (R. 18, 123). The merchandise was delivered in Seattle to crating and processing plants where it was processed for overseas shipment and transshipped by the Government to the Resident Engineer, U. S. Army, in the island in question (R. 19, 124).

Upon arrival of material and supplies at the island, the entire handling of all cargo was accomplished by Army personnel without regard to type or use (R. 19, 124). After discharge from the incoming vessels, the equipment, material, and goods were stock-piled at an Army sorting or classification yard, maintained and operated by the Army under the supervision of the Resident Engineer where it was guarded, sorted and distributed to the various Government contractors by military personnel (R. 19–20, 124).[6] From the sorting yard, the goods were loaded on trucks and taken to their ultimate storage destination (R. 20, 88–89, 124). Respondents' employees took charge of respondents' supplies at the time they were moved to respondents' warehouse or

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Construction Co., No. 359, this Term, Br. in Op., pp. 5–6. In the purchasing of all material, supplies or goods, title of the items passed directly to the Government from the vendor (R. 18–19, 123).

[6] Each contractor had an expediter on hand whose duties were to claim the goods intended for his company's project (R. 20, 88, 124).

other placement designated by respondents' supervisory employees (R. 20, 124).

After the goods were received at the various warehouses, the cases were opened and the merchandise checked for quantity (R. 89). As warehouse clerk (R. 43), it was claimant Stuart's[7] duty to check the items received against the respondents' purchase orders and ships' manifests (R. 87, 90).[8] He was not assigned duties at the classification yard or "loading platform" except in emergencies (R. 95, 101).[9] Claimant Stuart was classified as a Class "B" employee and was paid a fixed salary of $75 per week (R. 40–41).[10]

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[7] Petitioner states that, under his contract with respondents, he was to procure supplies for use in building the improvements and for the operation of a resale commissary, to furnish labor from the United States, and to operate mess halls and quarters (Pet. 3). This assertion is not supported by the record before this Court. Moreover, it is immaterial, since the petition herein seeks review only on behalf of claimant Stuart in Cause of Action No. 2 (Pet. 2).

[8] In addition, Claimant Stuart prepared "check lists" for the material checkers who were assigned duties at the Classification Yard or unloading dock (R. 87, 101–102). These lists were prepared from copies of the ships' manifests (R. 102).

[9] Witness Lloyd Finn, respondents' office manager, testified that occasionally, when several vessels were discharging at the same time, one or two men from the warehouse would go down to the classification yard or "loading platform" in in order to facilitate the movement of goods through there (R. 101).

[10] Class "B" employees were employed under a contract by the terms of which they were supposed to work as many hours as the contractor required them without extra compensation

ARGUMENT

The question presented by this case is substantially the same as that presented by the companion case, *Soderberg et al.* v. *S. Birch & Sons Construction Co. et al.*, No. 359, this Term, and the attention of this Court is respectfully invited to the brief in opposition filed by the Government therein. For the reasons there set forth (pp. 12–17), we submit that Stuart was not within the coverage of the Act and that the judgment below is correct.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HERBERT A. BERGSON,
Acting Assistant Attorney General.
SAMUEL D. SLADE,
EMERY COX, JR.,
Attorneys.

NOVEMBER 1947.

(R. 40–41). Claimant Stuart worked an average 60 hours per week. For this he was paid for 48 hours' work, straight time (R. 38–39). In addition, he was paid double time for Sunday work (R. 39).

U. S. GOVERNMENT PRINTING OFFICE: 1947